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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

18 | In re RIPPLE LABS INC. LITIGATION.

Case No. 4:18-cv-06753-PJH

20 | This Document Relates to:

**DEFENDANTS' REPLY IN FURTHER
SUPPORT OF THE JOINT
ADMINISTRATIVE MOTION TO
CONSIDER WHETHER CASES SHOULD
BE RELATED AND CONSOLIDATED
FOR PRETRIAL PURPOSES**

(Civil L.R. 3-12 and 7-11)

Judge: Hon. Phyllis J. Hamilton

PRELIMINARY STATEMENT

2 It is undisputed that *Toomey v. Ripple Labs Inc.*, No. 21-cv-06518-SK (N.D. Cal.) is related
3 to this action, and it should therefore be consolidated for pretrial proceedings as set forth in the
4 Court's March 19, 2019 Order. Dkt 35. Consolidation is appropriate here for the same reasons that
5 the Court consolidated all of the other related cases: it will promote efficiency and decrease the
6 risk of inconsistent outcomes in actions that are premised on the same theory of liability, involve
7 common issues of fact, are brought by members of the same putative class, and name the same
8 core set of defendants. All of the cases, including *Toomey*, turn on the same legal issue of whether
9 Ripple's distributions of XRP constitute "investment contracts" under the *Howey* test. *See SEC v.*
10 *W.J. Howey Co.*, 328 U.S. 293 (1946).

11 Plaintiffs Tyler Toomey and Markas Sergalis (“Toomey”) waited for years to file their
12 lawsuit. They entirely missed the Court’s process to appoint Lead Plaintiff in this action and have
13 since engaged in a series of machinations seemingly intended to avoid consolidation. Their
14 gamesmanship should not be rewarded, and their opposition to consolidation should be rejected.

ARGUMENT

16 It is “the norm in securities class actions” to consolidate actions that raise common
17 questions of law and fact. *Malriat v. QuantumScape Corp.*, 2021 WL 1550454, at *2 (N.D. Cal.
18 Apr. 20, 2021). The PSLRA encourages consolidation where “more than one action on behalf of
19 a class asserting substantially the same claim” is filed. 15 U.S.C. § 78u-4(a)(3)(A)(ii). Rule 42
20 affords the court wide latitude to consolidate cases that “involve a common question of law or
21 fact.” Fed. R. Civ. P. 42(a); see also *Investors Research Co. v. U.S. Dist. Court for Cent. Dist. of*
22 *Cal.*, 877 F.2d 777, 777 (9th Cir. 1989). Civil Local Rule 3-12(a) provides that actions are related
23 when they concern “substantially the same parties, property, transaction or event”; and it would
24 be unduly burdensome to allow the cases to proceed before different judges. Civ. L.R. 3-12(a).
25 “Neither Rule 42 nor the PSLRA demands that actions be identical before they may be
26 consolidated.” *In re Synergy Pharm. Inc. Securities Litig.*, 2019 WL 6150713, at *3 (E.D.N.Y.
27 Nov. 20, 2019). Securities class actions “are particularly suited to consolidation to help expedite
28 pretrial proceedings, reduce case duplication, avoid the involvement of parties and witnesses in

1 multiple proceedings, and minimize the expenditure of time and money.” *Hufnagle v. Rino Int’l*
 2 *Corp.*, 2011 WL 710704, at *2 (C.D. Cal. Feb. 14, 2011).

3 Toomey is attempting to circumvent a lengthy process that resulted in this consolidated
 4 action. As the Court is aware, beginning in 2018, numerous cases were filed against Ripple in this
 5 district and elsewhere by purchasers of XRP alleging that Ripple engaged in unregistered sales of
 6 a security in violation of federal and state law. In June 2019, Mr. Sostack (who is a resident of
 7 Florida) was named Lead Plaintiff. Toomey could have—but did not—filed a timely action and
 8 participated in the process resulting in appointment of the Lead Plaintiff. *See* 15 U.S.C. § 78u-
 9 4(a)(3)(B)(i); Dkt 35.

10 After skipping this Court’s process of appointing a Lead Plaintiff, Toomey made a number
 11 of moves that appear to be intended to avoid consolidation and proceed with a case that is separate
 12 but duplicative of this one. In January 2021, Toomey filed an initial complaint based on factual
 13 allegations similar to the Consolidated First Amended Complaint in this action, but on behalf of a
 14 putative class of Florida purchasers asserting only Florida claims. After Ripple noted to Toomey
 15 that his putative class was entirely subsumed by the putative class in this case and asked Toomey
 16 whether he would consent to transfer, Toomey filed an amended complaint adding federal
 17 securities claims against certain cryptocurrency exchanges (presumably in an attempt to avoid
 18 transfer and consolidation).¹

19 Congress passed the PSLRA to target “perceived abuses of the class-action vehicle” in
 20 private securities litigation. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81
 21 (2006). To curb these abuses, the PSLRA established safeguards to protect against frivolous and
 22 duplicative litigation. *Id.* Those safeguards require, among other things, that courts determine
 23 consolidation before nominating a Lead Plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(ii), (v); 15 U.S.C. §
 24 77z-1(a)(3)(B)(ii), (v). Toomey is not the Lead Plaintiff, and he should not be able to challenge
 25 the Lead Plaintiff’s “authority to decide what claims to assert on behalf of securities holders” or

26
 27 ¹ For a more complete description of Toomey’s gamesmanship, see Defendants’ Motion to
 28 Transfer, Dismiss, or Stay Plaintiffs’ Second Amended Complaint. *See Toomey*, No. 21-cv-06518-SK Dkts. 45 and 57.

1 interfere with his “ability and authority to manage the Consolidated Securities Actions.” *In re*
 2 *Synergy*, 2019 WL 6150713, at *5.

3 Toomey objects to consolidation on the grounds that he (1) alleges claims under Florida
 4 state law, rather than federal or California law, and (2) names additional defendants from which
 5 he might obtain relief that “cannot be awarded in the *In re Ripple* action, namely fees paid by
 6 Plaintiff Toomey and class members to Crypto.com for XRP trades.” Dkt. 146 at 4. These
 7 objections fail because “[d]ifferences in causes of action, defendants, or the class period do not
 8 render consolidation inappropriate if the cases present sufficiently common questions of fact and
 9 law, and the differences do not outweigh the interests of judicial economy served by
 10 consolidation.” *Ali v. Intel Corp.*, 2018 WL 2412111, at *2 n.4 (N.D. Cal. May 29, 2018) (internal
 11 quotation omitted). Indeed, these distinctions were presented to the Middle District of Florida in
 12 Plaintiffs’ opposition to transfer but were rejected and this case was transferred to this Court. *See*
 13 *Toomey*, No. 21-cv-06518-SK, Dkt. 69 (“Plaintiffs’ claims encompass and are based on the same
 14 alleged liability of the private actions consolidated in the California Action. Further, the parties
 15 are similar and the legal and factual issues are substantially similar so that Plaintiffs’ interests are
 16 represented in the California Action through the putative class members.”).

17 *Toomey* and this case have overlapping classes² and are premised on an identical theory of
 18 liability. The claims in *both* cases turn on the same fundamental question: whether Ripple’s
 19 distributions of XRP constitute “investment contracts” under the *Howey* test. *See Howey*, 328 U.S.
 20 at 299. That same test governs the outcome of the federal and California claims asserted in this
 21 case, as well as the Florida claims asserted by Toomey. Indeed, Toomey has acknowledged that
 22 the tests for whether XRP constitutes a security “are identical” between Florida law and federal
 23 law. *Compare Toomey*, No. 21-cv-06518-SK, Dkt. 26 ¶¶ 140–88 with Dkt. 87 ¶¶ 127–58 (alleging
 24 XRP meets all the elements of a security under the *Howey* test).

25 Toomey’s claims are also directed at the same “core set of defendants,” namely Ripple.
 26 *Farhar v. Ontrak, Inc.*, 2021 WL 2980589, at *2 (C.D. Cal. July 13, 2021); *see also Miller v.*

27 ² The putative class sought for certification in this case includes “[a]ll persons or entities who
 28 purchased XRP.” Dkt. 87 ¶ 166.

Ventro Corp., 2001 WL 34497752, at *4–6 (N.D. Cal. Nov. 28, 2001) (“[T]he fact that other parties are included does not preclude consolidation.”). Toomey’s addition of the exchange defendants should not defeat consolidation. One of the two exchange defendants (Foris Dax, Inc., Foris, Inc., Payward, Inc. d/b/a Kraken), has already been voluntarily dismissed, and the claims against the other are the same claims Plaintiff Sostack has already raised against Ripple—violations of Sections 5 and 12(a)(1) of the Securities Act of 1933. *Compare Toomey*, No. 21-cv-06518-SK, Dkt. 26 ¶¶ 277–84 with *In re Ripple*, No. 18-CV-06753-PJH Dkt. 87 ¶¶ 175–81.³

Toomey’s opposition to consolidation threatens to undermine years of efforts by the parties in this case to conserve judicial resources, proceed in an efficient manner, and reduce case duplication. As just one example, Ripple would be forced to respond to simultaneous and significantly overlapping discovery, and third parties would as well.⁴ When disputes inevitably arise, this Court would have to resolve those disputes for two different cases with similar (but not identical) discovery requests.

14 Moreover, if Toomey is allowed to proceed separately, it would provide a blueprint for
15 others to file copycat actions, tweak their allegations or name nominal defendants to evade this
16 Court’s consolidation order, and then force Ripple and this Court to wade through each action
17 individually. The impact would not only be felt in this case but countless other securities actions
18 across the country. Toomey’s objections should be rejected, and the Court should grant the parties’
19 joint motion to relate and consolidate these actions.

CONCLUSION

21 For the foregoing reasons, Ripple respectfully requests that this Court order that
22 (1) *Toomey* is related to this action, and (2) the cases are consolidated for pretrial purposes
23 consistent with this Court's prior order.

²⁶ ²⁷ ³ Moreover, the additional remedies that Toomey seeks from the remaining exchange defendants—“fees collected by Crypto.com relating to the purchase and sale of XRP” (Opp. at 7)—are nominal compared to the broader relief sought against the Ripple defendants.

²⁷ compared to the broader relief sought against the Ripple defendants.
²⁸ ⁴ Prior to transfer, Toomey served 133 discovery requests on Ripple and served a dozen third-party subpoenas. *Toomey*, No. 21-cv-06518-SK, Dkt. 45 at 6.

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2 Dated: September 10, 2021

Respectfully submitted,

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